

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

In the Matter of the Amendment
of the
Hawai'i Rules of Penal Procedure

ORDER AMENDING
THE HAWAI'I RULES OF PENAL PROCEDURE

(By: Moon, C.J., Levinson, Nakayama, JJ,
Intermediate Court of Appeals, Chief Judge Burns in
place of Acoba, J., who is unavailable, and Intermediate
Court of Appeals Judge Watanabe, assigned by reason of vacancy.)

IT IS HEREBY ORDERED that the Hawai'i Rules of Penal
Procedure are amended, effective July 1, 2003, as follows
(deleted material is bracketed, new material is underlined):

1. Rule 35 of the Hawai'i Rules of Penal Procedure is amended as follows:

RULE 35. CORRECTION OR REDUCTION OF SENTENCE

(a) Correction of Illegal Sentence.

The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence. A motion made by a defendant to correct an illegal sentence more than 90 days after the sentence is imposed shall be made pursuant to Rule 40 of these rules. [The court may reduce a sentence within 90 days after the sentence is imposed, or within 90 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 90 days after entry of any order or judgment of the

Supreme Court of the United States denying review of, or having the effect of upholding a judgment of conviction.] A motion to correct [or reduce] a sentence [which] that is made within the 90 day time period [aforementioned] shall empower the court to act on such motion even though the time period has expired.

(b) Reduction of Sentence. The court may reduce a sentence within 90 days after the sentence is imposed, or within 90 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 90 days after entry of any order or judgment of the Supreme Court of the United States denying review of, or having the effect of upholding the judgment of conviction. A motion to reduce a sentence that is made within the time prior shall empower the court to act on such motion even though the time period has expired. The filing of a notice of appeal shall not deprive the court of jurisdiction to entertain a timely motion to reduce a sentence.

2. Rule 40(a)(3) of the Hawai'i Rules of Penal Procedure is amended as follows:

(3) *Inapplicability.* Rule 40 proceedings shall not be available and relief thereunder shall not be granted where the issues sought to be raised have been previously ruled upon or were waived. Except for a claim of illegal sentence, [A]n issue is waived if the petitioner knowingly and understandingly failed to raise it and it could have been raised before the trial, at the trial, on appeal, in a habeas corpus proceeding or any other proceeding actually conducted, or in a prior proceeding actually initiated under this rule, and the petitioner is unable to prove the existence of extraordinary circumstances to justify the petitioner's failure to raise the issue. There is a

rebuttable presumption that a failure to appeal a ruling or to raise an issue is a knowing and understanding failure.

DATED: Honolulu, Hawai'i, April 25, 2003.